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# In the Supreme Court of the United States

OCTOBER TERM, 1954

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UNITED STATES OF AMERICA, EX REL. AUDREY M. TOTH, PETITIONER

*v.*

HAROLD E. TALBOTT, SECRETARY OF THE UNITED STATES AIR FORCE

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT*

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## BRIEF FOR THE RESPONDENT IN OPPOSITION

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# In the Supreme Court of the United States

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No. 150

UNITED STATES OF AMERICA, EX REL. AUDREY M. TOTH, PETITIONER

*v.*

HAROLD E. TALBOTT, SECRETARY OF THE UNITED STATES AIR FORCE

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT*

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## BRIEF FOR THE RESPONDENT IN OPPOSITION

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### OPINIONS BELOW

The opinion of the court of appeals (R. 37-53) has not yet been reported. The opinions of the district court (R. 21-23 and 30-33) are reported at 113 F. Supp. 330 and 114 F. Supp. 468.

### JURISDICTION

The judgment of the court of appeals was entered March 25, 1954 (R. 54). The petition for a writ of

certiorari was filed June 18, 1954. The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

## QUESTIONS PRESENTED

1. Whether Article 3(a) of the Uniform Code of Military Justice, providing that a person discharged from the armed services may, after discharge, be tried by court-martial for an offense committed while in service which is punishable by confinement of five years (or more) and is not triable by a court of the United States, is constitutional.

2. Whether Congress has empowered and constitutionally may empower the military authorities to apprehend a discharged serviceman accused of such offense for the purpose of bringing him to trial by court-martial.

3. Whether a person so apprehended may be removed from this country to the place of trial.

## STATUTES AND REGULATIONS INVOLVED

The Uniform Code of Military Justice, 64 Stat. 107-145 (50 U. S. C. 551-736) provides in pertinent part:

Article 3(a) (50 U. S. C. 553(a)):

> **Jurisdiction to try certain personnel.**
>
> Subject to the provisions of article 43, any person charged with having committed, while in a status in which he was subject to this code, an offense against this code, punishable by confinement of five years or more and for which the person cannot be tried in the courts of the United States or any State or Territory

thereof or of the District of Columbia, shall not be relieved from amenability to trial by courts-martial by reason of the termination of said status.

Article 5 (50 U. S. C. 555):

**Territorial applicability of the code.**

This code shall be applicable in all places.

Article 7 (50 U. S. C. 561):

**Apprehension.**

(a) Apprehension is the taking into custody of a person.

(b) Any person authorized under regulations governing the armed forces to apprehend persons subject to this code or to trial thereunder may do so upon reasonable belief that an offense has been committed and that the person apprehended committed it.

The Manual for Courts-Martial, United States, 1951 (promulgated under Executive Order No. 10214, dated February 8, 1951, 16 FR 1303-1469) provides in pertinent part:

Paragraph 11. **Termination of Jurisdiction.**—a. **General rule.**—The general rule is that court-martial jurisdiction over officers, cadets, midshipmen, warrant officers, enlisted persons, and other persons subject to the code ceases on discharge from the service or other termination of such status and that jurisdiction as to an offense committed during a period of service or status thus terminated is not revived by re-

entry into the military service or return into such status.

b. **Exceptions.**—To this general rule there are, however, some exceptions which include the following:

Jurisdiction as to an offense against the code for which a court-martial may adjudge confinement for five years or more committed by a person while in a status in which he was subject to the code and for which he cannot be tried in the courts of the United States or any State or Territory thereof or of the District of Columbia is not terminated by discharge or other termination of such status (Art. 3a). Jurisdiction under Article 3a should not be exercised without the consent of the Secretary of the Department concerned.

STATEMENT

Robert W. Toth was honorably discharged from the United States Air Force on December 8, 1952, after service in Korea (R. 1-2, 8). On April 8, 1953, after investigation, court-martial charges were preferred against him alleging that, on or about September 27, 1952, while in service in Korea, he had entered into a conspiracy to commit murder and had murdered a Korean national in violation of Articles 81 and 118 of the Uniform Code of Military Justice, 50 U.S.C. 675 and 712 (R. 8, 9, 14-18). On April 30, 1953, the Acting Secretary of the Air Force authorized Toth's apprehension, return to Korea and trial by court-martial on these charges

(R. 8-9, 19-20).[1] On May 13, 1953, Toth was apprehended by military personnel in Pittsburgh, and he subsequently was flown to Korea to stand trial (R. 9).[2]

On May 27, 1953, Toth's sister filed in the District Court for the District of Columbia a writ of habeas corpus, directed to the Secretary of the Air Force, seeking Toth's release from the custody of the Air Force on the ground that his apprehension and removal to Korea were in violation of the Constitution and the Rules of Criminal Procedure (R. 1-6). The district court issued an order to show cause (R. 7); respondent filed a return (R. 7-20); and the district court, after hearing argument, ordered that the writ issue (R. 21-23).[3] After Toth was produced in court, the district court ordered his discharge from military custody, on the ground that

[1] Paragraph 11b of the Manual for Courts-Martial, 1951, 16 F.R. 1308, provides that jurisdiction under Article 3(a) of the Code, *supra*, for offenses committed while in service triable by court-martial, after discharge, "should not be exercised without the consent of the Secretary of the Department concerned."

[2] The complete record before the district court, which is on file with the Clerk of this Court, contains affidavits by military personnel to the effect that Toth was informed of the investigation on March 11, before charges were preferred (Tr. 127-131); that the charges were read to him at the time he was apprehended and again at the Provost Marshal's office in Pittsburgh (Tr. 142-148); that he was informed that he could call his family and telephone a civilian lawyer, if he so desired, and was later similarly advised at Andrews Air Force Base, Maryland (Tr. 143, 155-157); that later a civilian attorney, retained by Toth's family, flew to Korea with the assistance of the Air Force (Tr. 167).

[3] An appeal from that order was dismissed on the ground that the order was not final (R. 27-28).

no provision was made in the Code of Military Justice for the removal of a civilian for trial by court-martial to a point distant from the place of apprehension (R. 30-33).

On appeal, the judgment of the district court was reversed (R. 54). The court of appeals held that both the language and legislative history of Article 3(a) reveal the Congressional purpose to make persons discharged from service amenable to trial by court-martial for serious crimes committed while in service which could not be tried by a court of the United States; that there is "no constitutional infirmity in amenability to trial at the place of the offense and under the law applicable to the offense at the time of its commission" (R. 39-40); and that "the statute which makes a civilian amenable to trial by court-martial necessarily connotes authority to apprehend him for that purpose and to remove him for trial to the place where the alleged offense was committed" (R. 51).

## ARGUMENT

For more than eighty years, Congress has exercised, and the federal courts have sustained, the power to provide for trial by court-martial of persons who commit crimes while in the military service but are not apprehended or tried until after their separation from the service. In Article 3(a) of the Uniform Code of Military Justice, this power has been exercised with obvious restraint and propriety, being limited to offenses which are (1) serious in character and (2) not triable by any

American court if they are not triable by court-martial. There is, we submit, no merit in petitioner's claim that the Article is unconstitutional. And it is equally clear that petitioner misreads the Code in the independent arguments that though Congress provided for trial by court-martial in cases like this, it left the provision pointless by failing to confer authority for apprehension of the defendant and failed to permit the defendant's removal for trial to the place of the crime, a procedure which is permitted in all other court-martial cases.

1. The petition for a writ of certiorari speaks generally in terms of the authority of the military to try a civilian, but no such issue is really involved. We are not concerned with a person who has never been subject to military discipline. The alleged crime here involved is one committed by a person in the armed forces while he was subject to military discipline, a crime which cannot be tried by any civilian court in the United States. The real question, therefore, is whether Congress may constitutionally provide that a member of the armed forces who commits a serious crime while in service shall not automatically receive absolution by virtue of the fact that he happens to have been discharged before the crime or his responsibility therefor has been discovered.

As the court below points out (R. 41-43), that is not a novel question. Since 1863, Congress has provided for cases in which discharge from military

service would not operate as a bar to trial by court-martial for crimes committed while in service. Specifically, until enactment of the new Code, it had provided for trial by court-martial of discharged persons accused of committing fraud against the government while in service.[4] The constitutionality of such provisions has repeatedly been upheld. *In re Bogart*, 3 Fed. Cas. 796 (C. C. D. Cal.); *Ex parte Joly*, 290 Fed. 858 (S. D. N. Y.);[5] *Terry* v. *United States*, 2 F. Supp. 962 (W. D. Wash.); *United States ex rel. Marino* v. *Hildreth*, 61 F. Supp. 667 (E. D. N. Y.); *Kronberg* v. *Hale*, 180 Fed. 2d 128 (C.A. 9), certiorari denied,

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[4] Section 2 of the Act of March 2, 1863, 12 Stat. 696, 697, provided in pertinent part that:

> * * * any person heretofore called or hereafter to be called into or employed in such forces or service, who shall commit any violation of this act and shall afterwards receive his discharge, or be dismissed from the service, shall, notwithstanding such discharge or dismissal, continue to be liable to be arrested and held for trial and sentence by a court-martial, in the same manner and to the same extent as if he had not received such discharge or been dismissed.

Substantially similar provisions appear as Article of War 60, Rev. Stat. 1342 (1878); Article of War 94 (1920), 41 Stat. 805, 10 U.S.C. (1946 ed.) 1566; Article of War 94 (1948), 62 Stat. 640, 10 U.S.C. (Supp. IV) 1566.

[5] The constitutional doubts expressed by Colonel Winthrop, to which petitioner refers (Pet. 9-10), were noted by the court in *Ex parte Joly*, *supra*, 290 Fed. at 860, the court stating that Colonel Winthrop "realized that such authority as there was held otherwise." See, also, Morgan, *Court-Martial Jurisdiction over Non-Military Persons under the Articles of War*, 4 Minn. L. Rev. 79, 83-84, concluding that the matter of continuing court-martial jurisdiction presents no constitutional difficulty.

339 U. S. 969; see also the references to the 1863 statute in the decision of this Court in *Hirshberg* v. *Cooke*, 336 U. S. 210, 214. The basic rationale of the decisions is that such continuing jurisdiction is consistent with the Fifth Amendment, which excepts from the requirement of indictment "cases arising in the land or naval forces," since the case arises when the crime is committed, *i.e.* while the accused is in the military service.

Article 3(a) of the present Uniform Code merely extends the principles of the earlier statute to all serious crimes punishable by imprisonment for five years or more. The legislative history shows that Congress wished to avoid, for the future, results such as those in *Hirshberg* v. *Cooke*, 336 U. S. 210, and *In re Lo Dolce*, 106 F. Supp. 455 (W. D. N. Y.), where men accused of major crimes committed during military service were discharged and were thereafter immune from punishment either by civil or military courts. Congress thought it undesirable "that some persons can escape trial by court martial by the mere lawful termination of service", and yet wished to place "sufficient limitations on the continuing jurisdiction to prevent capricious actions on the part of military authorities." S. Rep. No. 486, 81st Cong., 1st sess., p. 8; H. Rep. No. 491, 81st Cong., 1st sess., p. 5. Hence, it limited the continuing jurisdiction to serious offenses that could not otherwise be tried by American civil courts.

2. Conceding the purpose of Congress in Article

3(a) of the Uniform Code to permit trial by court-martial of discharged servicemen like the accused in this case (though questioning the *power* of Congress to do so), petitioner nevertheless argues (Pet. 10-12) that Congress failed to provide authority for the apprehension of such persons for trial. In this argument, petitioner misreads Article 9 of the Uniform Code and ignores the clear power of apprehension conferred by Article 7.

Article 7 of the Code, 50 U. S. C. 561, provides:

> (a) Apprehension is the taking into custody of a person.
>
> (b) Any person authorized under regulations governing the armed forces to apprehend persons subject to this code *or to trial thereunder* may do so upon reasonable belief that an offense has been committed and that the person apprehended committed it. [Emphasis added.]

The authority to "arrest" persons amenable to trial by court-martial under Article 3(a) is thus part of the general authority to "apprehend" conferred by Article 7.

This provision for apprehension by military authorities of discharged servicemen subject to trial by court-martial is in keeping with a long-established historical pattern. The original fraud statute of 1863, from which Article 3 basically stems, provided that discharged persons amenable to trial by court-martial were to be "arrested and held for trial and sentence by a court-martial, in the same

manner and to the same extent" as if not discharged. Thus, historically, Congress had provided that the continuing jurisdiction of the military over discharged persons accused of certain crimes should be exercised directly by military action to take the accused into custody for trial. The continuation of the same procedure was plainly authorized by the general provisions for apprehension in Article 7, quoted above, which cover this case.

Petitioner's claim of inconsistency between Article 3(a) and Article 9, 50 U. S. C. 563,[6] (Pet. 11-12) is based upon a misconception of the term "arrest" as used in the Code. The provisions of Article 9(c) do not deal with "arrest" as that term is used in civilian terminology. The Code term for the civilian concept of arrest is "apprehension." This was

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[6] Article 9 provides in pertinent part:

(a) Arrest is the restraint of a person by an order not imposed as a punishment for an offense directing him to remain within certain specified limits. Confinement is the physical restraint of a person.

* * * * *

(c) An officer, a warrant officer, or a civilian subject to this code or to trial thereunder may be ordered into arrest or confinement only by a commanding officer to whose authority he is subject, by an order, oral or written, delivered in person or by another officer. The authority to order such persons into arrest or confinement may not be delegated.

* * * * *

(e) Nothing in this article shall be construed to limit the authority of persons authorized to apprehend offenders to secure the custody of an alleged offender until proper authority may be notified.

made clear at the House Hearings before the Subcommittee of the Committee on Armed Services on H. R. 2498, 81st Cong., 1st sess., p. 902, where, with reference to this matter, it was stated:

> Mr. Larkin. This is new in format, more than in anything else, Mr. Chairman. In our study of the Articles of War and the Articles for the Government of the Navy we found a certain duality of meaning in the words "arrest", "restraint", "confinement", and words of that character, and we adopted this scheme to clarify the definitions of those words and started off with "apprehension" in article 7.

Article 9 is, therefore, irrelevant to the question of the authority to take a discharged serviceman into military custody, *i.e.*, to "apprehend" him, for the purposes of court-martial under Article 3(a). That authority is the general authority to "apprehend" conferred by Article 7.

Petitioner's argument as to the danger of abuse of the power conferred on the military authorities by Article 3(a) as implemented by Article 7, has no foundation in reality. While the general power of apprehension conferred by Article 7, covering many situations beyond those presented by Article 3(a), seems on its face to be broad, no serious possibility of abuse exists when that power is considered, as it must be, in the light of the limitation set by Article 3(a) and the implementing regula-

tions. In the first place, under Article 3(a), jurisdiction over discharged servicemen is limited to serious offenses, punishable by imprisonment for five years or more, and then only to such offenses as cannot be tried in a civil court. Moreover, as noted above, the Manual for Courts-Martial, in implementing Article 3(a), provides that such jurisdiction should not be exercised without the consent of the Secretary of the Department concerned. Thus, before an attempt is made to assert jurisdiction over a discharged serviceman under Article 3(a), there are not only the ordinary preliminary safeguards of Article 30, 50 U. S. C. 601, requiring sworn charges by a person who "has personal knowledge of, or has investigated, the matters set forth therein", but also the additional safeguard of review by the Secretary of the Department concerned. The provision for such review insures that in every case, as in this one, a thorough preliminary investigation will necessarily precede the apprehension of a discharged serviceman for trial by court-martial under Article 3(a). In sum, ample precautionary measures are provided to make certain that a person will not lightly be taken from civilian life for trial by court-martial.

That Congress has entrusted to military authority the initial judgment as to the existence of probable cause to believe that a person has committed a crime subject to military jurisdiction does not establish a lack of due process. As the court said in

*In re Bogart, supra*, the first case to consider the question of continuing court-martial jurisdiction over discharged servicemen (3 Fed. Cases at 801):

> This court has no more right to assume or suppose that those who, by the constitution and laws, are made the depositories of jurisdiction over military offenses, will abuse these powers, than that those who, by the same constitution and laws, are entrusted with the general civil jurisdiction of the land, will abuse the trust devolved upon them.[7]

Moreover, as the court below points out (R. 48), "the federal courts were open to Toth upon petition for a writ of *habeas corpus* at every instant after his apprehension"—insuring his right to due process and safeguarding against action by the military authorities in excess of their jurisdiction (affording review, for example, of such questions as whether Toth was actually an ex-serviceman, whether the crime in question was comprehended

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[7] That a hearing by a civilian court is not a constitutional prerequisite to the exercise of military jurisdiction is established by decisions upholding the validity of selective service regulations promulgated during World War I under authority of the Selective Service Act of May 18, 1917, 40 Stat. 76, to the effect that persons who failed to report for induction would be automatically inducted into the armed forces upon receipt of a notice of induction, and thereafter subject to court-martial jurisdiction. *United States ex rel. Bergdoll* v. *Drum*, 107 F. 2d 897 (C.A. 2), certiorari denied, 310 U.S. 648; *United States* v. *McIntyre*, 4 F. 2d 823 (C.A. 9); *United States ex rel. Feld* v. *Bullard*, 290 Fed. 704 (C.A. 2), certiorari denied, 262 U.S. 760; *Franke* v. *Murray*, 248 Fed. 865 (C.A. 8).

by Article 3(a), etc.).[8] Petitioner was in fact accorded such a hearing, and his rights were therefore protected by the judiciary.

3. The removal of a discharged serviceman so apprehended to the place of trial presents no constitutional or statutory problems. Once he is brought within the jurisdiction of the military for the purposes of trial, he may clearly be removed to the place of trial as would any person actually in the armed forces. There is no territorial limitation on courts-martial. Article 5 of the Uniform Code, 50 U.S.C. 555, provides that "This code shall be applicable in all places." The accused, like other persons subject to court-martial jurisdiction, has numerous rights conferred by the Code, *e.g.*, the right to preliminary investigation under Article 32, 50 U.S.C. 603, to preliminary review of the charges under Article 34, 50 U.S.C. 605, and the right to representation by counsel under Articles 32, *supra*, and 38, 50 U.S.C. 613. As the court below stated (R. 46):

> These provisions of the Uniform Code seem to afford an accused as great protections by way of preliminary inquiry into probable cause as do requirements for grand jury in-

[8] The Government conceded the district court's jurisdiction (R. 21). Toth could have sought habeas corpus when he was apprehended in the United States and during the period thereafter before his transfer to Korea. Cf. *Burns* v. *Wilson*, 346 U.S. 137, where petitioners were convicted by court-martial in Guam, within the jurisdiction of a federal district court, then transferred for the convenience of the Government to await execution in Japan.

quiry and indictment. * * * Thus the basic purpose of a hearing preliminary to trial is being met by a method designed pursuant to constitutional provisions, and the method meets all elements essential to due process in that feature of the proceedings.

## CONCLUSION

The decision below is clearly correct and is in accord with precedents extending back over eighty years. It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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JULY, 1954.